

Atlantic Richfield Company

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July 7, 2016

VIA EMAIL AND U.S. MAIL

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Legal Enforcement Program
Office of Enforcement, Compliance,
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U.S. EPA, Region 8
1595 Wynkoop Street
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Charles Coleman
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U.S. EPA Region 8, Montana Office
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Helena, MT 59626

Re: Notice of Intent to Comply with Administrative Order for Remedial
Action for the Anaconda Smelter Superfund Site; Anaconda
Regional Water Waste and Soils Operable Unit, Smelter Hill
Uplands Remedial Design Unit No. 3
EPA Docket No. CERCLA 08-2016-0005

Gentlemen:

Respondent Atlantic Richfield Company ("Atlantic Richfield") provides this letter as notice that it will comply with the lawful requirements of the above-referenced Unilateral Administrative Order ("UAO") for the Smelter Hill Uplands Remedial Design Unit ("Uplands RDU") remedial action within the Anaconda Regional Water Waste and Soils operable unit ("ARWW&S OU") of the Anaconda Smelter Site.

In providing this notice of Atlantic Richfield's intent to comply with the UAO, Atlantic Richfield does not request an opportunity to confer with the EPA to discuss the UAO or the Smelter Hill Uplands Work. EPA has represented to Atlantic Richfield that EPA is satisfied with method and timing of on-going communications on matters concerning the work and schedule for the Warm Springs Creek RDU and other on-going ARWW&S response activities. As discussed with EPA representatives, Atlantic Richfield and EPA will follow the same protocols for consultation and routine meetings regarding the Smelter Hill RDU Work under the UAO. Unless otherwise notified by EPA, Atlantic Richfield understands the parties' present course of conduct for communications, including documentation of work modifications by RFC's and notations in the daily log, satisfies the intent and written requirements of the UAO.

Given Atlantic Richfield's and EPA's shared interest in development of an Anaconda Smelter Site-wide consent decree, this letter also confirms Atlantic Richfield's willingness to defer receipt of EPA's response to Atlantic Richfield's Comments, Requests for Clarification and Objections to the UAO. We propose that EPA and Atlantic Richfield direct their efforts in the near-term toward completion of tasks necessary to support a Site-wide consent decree that would supercede the UAO, once it was signed and approved by the federal court. Accordingly, Atlantic Richfield is willing to defer receipt of EPA's response to this letter to February 28, 2017, with the understanding that EPA and Atlantic Richfield may agree to further defer a written response so long as the parties' continue to make progress toward development of a Site-wide consent decree.

Paragraph 52.a (Notice to Successors-in-Title) requires submittal of a notice that describes Respondent's Affected Property for actions under the UAO. I understand Atlantic Richfield counsel has discussed with EPA counsel our request that EPA defer this requirement for RDU#3 and the same requirement that arises under the Warm Springs Creek RDU#10 UAO in recognition that certain property transfers are in process. As explained in Section 1 of our comments, Atlantic Richfield proposes to submit a notice for EPA approval by September 30, 2016 that will satisfy both orders.

The text of the Smelter Hill Uplands UAO is substantially the same as the EPA orders issued to Atlantic Richfield for the Warm Springs Creek RDU (EPA Docket No. 08-2015-0010) and the Community Soils Operable Unit (EPA Docket No. 08-2015-011). Atlantic Richfield submitted Notice of Intent to Comply letters for those orders, each dated November 17, 2015. EPA has not responded to Atlantic Richfield's Comments, Requests for Clarification and Objections to those orders, and Atlantic Richfield's comments and objections to the Smelter Hill RDU UAO are substantially the same in content and scope. Thus, Atlantic Richfield proposes that EPA also defer its written response to the two November 17, 2015 letters to January 2017 so long as the parties' continue to make progress toward development of a Site-wide consent decree that would supercede those UAOs.

We look forward to receipt of EPA's written concurrence to defer Atlantic Richfield's notice obligation under Paragraph 52.a of the UAO and EPA's responses to this letter and the previously submitted notice letters prepared in review of the orders issued for Warm Springs Creek RDU and Community Soils Operable Unit work.

Atlantic Richfield's comments and requests for clarification concerning the UAO follow below in Section I. Section II contains Atlantic Richfield's objections to the UAO.

I. COMMENTS AND REQUESTS FOR CLARIFICATION

Following are comments and requests for clarification concerning the UAO.

A. Scope of the UAO

The UAO scope of work implements a portion of the remedial action, specifically the Uplands RDU, selected in the Record of Decision for the ARWW&S OU signed on September 29, 1998, and EPA's ROD Amendment signed on September 29, 2011. The scope of work is detailed in the Final Design Report/Remedial Action Work Plan ("FDR/RAWP") dated July 2013, Document ID Number 1559383, Reference C. As referenced in Paragraph 27 of the UAO, EPA approved the RAWP/FDR on August 23, 2013, Document ID Number 1559375, Reference D. The scope of work was subsequently amended to include the Final Smelter Hill Uplands Remediation Design Unit (RDU 3) App. B 5 Engineered Storm Water Controls Plan Addendum 2 - Birch Street and AFFCO Gulch Sediment Control Ponds, dated April 25, 2016, and approved by EPA in consultation with MDEQ on May 24, 2016.

B. Schedule and Delay in Performance

Paragraph 44 of the UAO requires Atlantic Richfield to implement and perform Remedial Action ("RA") and other Work in accordance with the FDR/RAWP. The UAO does not include a projected construction schedule for Work. The schedule for Uplands RDU Work has been discussed with Agency representatives, and the projected RD/RA schedule is an estimate only, and the timing for future Work is dependent upon confirming access to certain properties. Through regular weekly meetings and other routine communications, Atlantic Richfield commits to keep EPA apprised of Work progress and advise EPA of any adjustments to the construction schedule that are appropriate.

While the UAO contains no schedule for Work, EPA requires that Respondent notify EPA of "any delay or anticipated delay in performing any requirement of this Order" within 48 hours after Respondent "knew or should have known that a delay might occur." Section XIV, Paragraph 63. These requirements are not enforceable as the Order does not provide sufficient information to identify the matters for which notice must be provided to EPA if a delay is encountered in performing the Work. Further, notwithstanding the ambiguity as to the specific requirements subject to notice under Paragraph 63, EPA asserts that any delay in performance that is not properly justified shall be considered a violation of the Order. See Paragraph 64. Atlantic Richfield objects to these requirements.

Additionally, Paragraph 6 of the UAO requires Atlantic Richfield to provide copies of the UAO to each contractor representing Atlantic Richfield with respect to the Site or the Work. As explained below, contractor selection for implementation of all of the actions described in the FDR/RAWP will not be completed by July 2016. The UAO will be provided to contractors and other representatives who perform Work as Atlantic Richfield completes its contractor selection and award process, and after selected contractors are formally retained.

Please confirm in writing that Atlantic Richfield's request for a flexible RD/RA schedule is accepted, with the understanding that Atlantic Richfield will advise EPA of the progress of Work through the routine meetings among EPA and Atlantic Richfield representatives.

C. Wildlife Risk

Paragraph 13 of the UAO reports that wildlife are at risk from exposure to contaminated soils. As Atlantic Richfield has noted in the past, the Texas Tech University report entitled, "Wildlife Biomonitoring at the Anaconda Smelter Site" (May 2001), found that the original predictive model used as the screening tool in the Anaconda Smelter NPL Site Ecological Risk Assessment overestimated risk to many wildlife receptors. For example, more recent studies, completed in 2013, evaluated lead exposure to passerine birds in the Dutchman Creek High Arsenic Area where high quality wetlands habitat will be protected in perpetuity. The weight-of-evidence of data and information from the study area and related studies (including the new information cited by the U.S. Fish and Wildlife Service from the Beyer et al. 2013 and Hansen et al. 2011 publications) demonstrated that the concentrations of lead in Dutchman soils are not at levels that pose unacceptable risk to birds, including vermivores. (ARCADIS, December 2013).

Based on that data, the conclusion in paragraph 13 that wildlife is at risk from exposure to contaminated soils in the WSC RDU is inaccurate, and does not reflect the risk posed by current conditions.

At EPA's request, Atlantic Richfield has collected additional soil lead data in areas within the Uplands RDU, and the data will be available soon to support further evaluation of this issue.

D. Property Requirements

Paragraph 48 of the UAO notes that access to complete the Work must be secured from Non-Respondent Owner's for Work on Affected Property, as those terms are defined by the UAO. And the UAO requires that Respondent

shall use best efforts to secure such access agreements. Atlantic Richfield objects to the UAO description of "best efforts" in Paragraph 49 to include the payment of "reasonable sums of money" for access to complete RA. Non-Respondent Owners of Affected Property are benefited by RA, and compensation for access only to complete the Work is not appropriate, nor should it be described as a contingency under the terms of the UAO.

In the event Atlantic Richfield is unable to secure an access agreement without payment of compensation to a Non-Respondent Owner to access that landowner's property, we will notify EPA and request EPA's support in securing access for Work on such Affected Property. EPA's demand that Respondent notify EPA "within 30 days of the Effective Date" whether Respondent has successfully been able to secure access to all properties for all purposes under the UAO, and to "accomplish what is required through "best efforts," is both unreasonable and impractical for the Uplands RDU. Thus, Respondent requests that EPA revise Paragraph 49 to delete the requirement that Respondent notify EPA within thirty (30) days of the Effective Date of Respondent's efforts to secure access to all Affected Property.

Atlantic Richfield's form access agreements for: (a) RD/RA sampling, and (b) RA construction, if necessary for a given property, are included together as Exhibit A to this response. These form access agreements have been and are presently being utilized to secure access for response actions on residential and other property at the Site. Atlantic Richfield's access agreements do not require that a Non-Respondent Owner of Affected Property "refrain from using such Affected Property in any manner that the EPA determines will pose an unacceptable risk to human health or the environment due to exposure to Waste Material, or interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action." See UAO, Para. 48(ii).

Paragraph 51 directs that Respondent cooperate with EPA's and the State's efforts to ensure compliance with Institutional Controls, including the Community Protective Measures Program. Atlantic Richfield has and will continue to cooperate with EPA and the State to finalize Institutional Controls for the Anaconda Smelter Site, including the ARWW&S OU. The parties' agreement upon Institutional Controls plans and requirements is critical to successful negotiation of an Anaconda Site-wide consent decree.

Paragraph 52.a requires submittal of a notice describing Respondent's Affected Property where response actions will be taken under the UAO. Atlantic Richfield requests deferral of the Paragraph 52.a requirement for submittal and recording of such notice for RDU#3 and the same requirement that arises under the Warm Springs Creek RDU#10 UAO. As discussed with EPA, there are certain property transfers in process. A notice recorded in the near-term would

not be accurate, if the transfers are completed. Atlantic Richfield proposes to submit a notice for EPA approval that satisfies the Paragraph 52.a requirement by September 30, 2016. Atlantic Richfield anticipates a single notice will be prepared and recorded to satisfy both orders. Atlantic Richfield commits to comply with the lawful requirements of Paragraph 52.b and Paragraph 53.

Atlantic Richfield requests that EPA confirm the requested deferral for submittal of the Paragraph 52.a notice is approved, the two form access agreements attached as Exhibit A are acceptable to secure access for Work, and that the Para. 48(ii) text noted above is not required text for access agreements with Non-Respondent Owners of Affected Property. Further, in the event EPA is unwilling to revise the text of ¶¶ 48, 49, 63 and 64 as requested in Sections I.B and I.D of this Notice of Intent to Comply submittal, Atlantic Richfield requests that EPA confirm in writing that the approach described above in Sections I.B and I.D is acceptable, meets the intent of and is deemed compliant with the terms of the UAO.

E. Designation and Qualifications of Project Coordinator and Supervising Contractor

As required by Paragraph 43.c, Atlantic Richfield designates Shannon Dunlap to serve as the Project Coordinator. Mr. Dunlap's contact information is as follows:

317 Anaconda Road
Butte, Montana 59701
Direct: (406) 723-1813
Cell: (406) 498-6630
Email: Shannon.Dunlap@bp.com

Mr. Dunlap has provided project management for other ARWW&S OU response activities. Atlantic Richfield requests confirmation that it will not be necessary to provide EPA with a separate submittal describing Mr. Dunlap's technical qualifications.

The identity and qualifications of Atlantic Richfield's Supervising Contractor will be provided when contractor selection is complete. Thus, Atlantic Richfield cannot comply with the requirements of Paragraph 43.c.(1) as written, and we request revision of the UAO to delete the requirement for designation of Atlantic Richfield's Supervising Contractor "within 10 days after the Effective Date."

Paragraph 43.a(3) notes that Respondent's and EPA's Project Coordinators will meet at least monthly. This is the current practice, and

Atlantic Richfield concurs with planning meetings at least monthly. In addition to these meetings, the current practice is weekly meetings with EPA's oversight representative, Ken Brockman, at which issues related to field work are discussed and resolved. In conflict with this practice, Paragraph 47.c suggests that all modifications to the activities described in the FDR/RAWP must be confirmed in writing and by amendment to the FDR/RAWP to bind EPA. Consistent with the parties' agreement to continue the current course of conduct for communications on the Work, please confirm these practices, including documentation of work modifications by RFC's and notations in the daily log, meets the intent of and is deemed compliant with the terms of the UAO.

F. Access to Information

Paragraph 67 of the UAO directs that Respondent shall provide information and Records to EPA upon request. Upon request, Atlantic Richfield will provide non-privileged documents requested by EPA and access to Company employees and representatives as described in Paragraph 67 to provide information not protected from disclosure by an applicable privilege. However, in providing information and Records to EPA, Respondent may assert business confidentiality protections are applicable to Records such as contracts, as provided at 40 C.F.R. 2.201 *et seq.*

G. Appendix E, Index of Administrative Record

Section XXI (Administrative Record), Paragraph 79 of the UAO incorporates by reference (as Appendix E to the UAO) EPA's Index of Administrative Record. Reference E has not been provided to Atlantic Richfield with the UAO, and thus Atlantic Richfield reserves comment on the content of any administrative record designated by EPA. Further, Atlantic Richfield incorporates by reference here its comments set forth in Section G. (Reference E, Index of Administrative Record) set forth in Atlantic Richfield's November 17, 2015 Notice of Intent to Comply with the WSC RDU UAO. Atlantic Richfield reserves its right to supplement its comments upon receipt of Reference E to the UAO.

II. **OBJECTIONS TO THE UAO**

A. Jurisdiction, Findings of Fact, Conclusions of Law and Determinations

Atlantic Richfield does not admit and reserves its right to contest the statements contained in the Jurisdiction and General Provisions, Findings of

Fact, and Conclusions of Law and Determinations Sections (Sections I, IV and V) of the UAO. Atlantic Richfield's Notice of Intent to Comply shall not under any circumstances constitute an admission of the terms or conditions of the UAO, or of any liability associated with the Site, and Atlantic Richfield expressly reserves its right to contest the same.

B. The Unilateral Order to Pay Response Costs is Unlawful and Outside the Scope of the Agency's Authority

Section XV, paragraph 65 of the UAO, mandates that Respondent reimburse EPA for claimed Response Costs, as that term is defined by the UAO. The UAO was issued under the authority of Section 106(a) of CERCLA. EPA's authority under Section 106(a) of CERCLA is limited to the issuance of orders for abatement actions "as may be necessary to protect public health and welfare and the environment." Section 106(a), among other limitations, does not authorize EPA to order a potentially responsible party ("PRP") to reimburse the Agency for response costs. EPA has the right to pursue a separate civil action to recover response costs. Paragraph 74.e (Reservation of Rights) of the UAO includes a reservation of claims for response costs, but does not specifically refer to the need to pursue them through a separate judicial action. Atlantic Richfield reserves the right to contest the amount of EPA's claimed costs of response in such an action.

Moreover, the United States has filed a complaint against Atlantic Richfield in the litigation styled *United States v. Atlantic Richfield Company, Inc.*, CV-89-39-BU (D. Mont.) alleging that Atlantic Richfield is liable for response costs. Thus, the administrative claim for the response costs set forth in the UAO is preempted by the claim for these same costs in the pending litigation. By ordering the Respondent to reimburse the Agency for response costs under a Section 106(a) UAO, EPA attempts to deprive Atlantic Richfield of its statutory right to challenge its liability for response costs under Section 107(a) of CERCLA.

Consistent with past practice, Atlantic Richfield will continue to work with EPA to resolve any claims for EPA response costs by mutual agreement, and to document such agreements through the consent decree process.

C. Notification of Personnel and Contractors

Section X, paragraph 43 requires that Atlantic Richfield notify EPA and provide qualifications for Atlantic Richfield's Project Coordinator and Supervising Coordinator. Further, the UAO seeks to impose qualifications for project personnel that are not found in CERCLA or the NCP. Pursuant to paragraph

43.c, EPA may disapprove such contractors or personnel. EPA has no authority under CERCLA to require notification or to approve or disapprove contractors and personnel selected by Atlantic Richfield. Notwithstanding this lack of authority, Atlantic Richfield has identified Shannon Dunlap as Atlantic Richfield's Project Coordinator, and, as described in Section I.E of this letter, will notify EPA when Atlantic Richfield has selected a Supervising Contractor to carry out the Work under the Order.

D. Insurance

Section XIII, paragraph 62 requires the Respondent to obtain and maintain certain insurance before initiating the Work required by the UAO. Atlantic Richfield will obtain and maintain insurance, and require that its contractors maintain insurance that satisfies the coverage limits described in the UAO. Atlantic Richfield objects, however, to "naming the United States as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Respondent." This requirement is outside the scope of EPA's authority. While Atlantic Richfield may agree to name the United States as an additional insured by contract (consent decree), EPA may not impose such obligation unilaterally under its administrative authority.

E. Enforcement / Work Takeover

Atlantic Richfield notes that the civil penalty provisions for failure to comply with the UAO set forth in Section XVIII, paragraph 73, do not apply if sufficient cause exists for failure or refusal to comply, or if the failure to comply was not willful. See Sections 106(b)(1) and 107(c)(3) of CERCLA. In addition, such penalties may be recovered only through a separate judicial action, and may not be imposed unilaterally by EPA. Moreover, Atlantic Richfield objects to EPA's demand, set forth in Paragraph 40 of the UAO, that this notice of Atlantic Richfield's intent to comply with the lawful requirements of the UAO describe any sufficient cause defense that Atlantic Richfield may later assert to EPA's enforcement of the Order. Nothing in CERCLA authorizes EPA to demand that Atlantic Richfield "preview" any defense to future enforcement. As well, EPA's assertion that Atlantic Richfield's failure to set forth its sufficient cause defense in this letter "shall be treated as a violation of the Order" is without basis in the law, and tantamount to a denial of Respondent's right to due process.

F. Financial Assurance

Section XII, paragraphs 54 thru 61 require Atlantic Richfield to, among other things, secure and maintain financial assurances in an amount deemed necessary by EPA to demonstrate Respondent's ability to implement the Work required under the UAO, and to establish and maintain a standby trust to which

future payments could be deposited at EPA's direction. Atlantic Richfield objects to these collective requirements because EPA lacks authority to require such assurances in a UAO. While Atlantic Richfield may agree to provide financial assurance and assume other obligations described in Section XII by contract (consent decree), EPA may not impose such obligation unilaterally under its administrative authority.

Atlantic Richfield represents to EPA that Atlantic Richfield has the financial capacity to fund and complete the Work under the UAO. Atlantic Richfield will provide EPA upon request with an unaudited financial report that summarizes Atlantic Richfield's financial condition. To receive the report, Atlantic Richfield requires that EPA acknowledge the financial report and its contents are business confidential, and agree to protect such report and its contents from disclosure under CERCLA and 40 C.F.R. Part 2, Subpart B.

G. Record Retention – Certification

Under Section XVII, Paragraph 72 of the UAO, EPA demands that Atlantic Richfield submit a written certification that no Records, as that term is broadly defined in Paragraph 67, to the best of its knowledge, have been altered, mutilated, discarded, destroyed or otherwise disposed of "relating to its potential liability regarding the Site." Given the breadth of EPA's demand, Atlantic Richfield is not able to provide the requested certification. In addition, EPA lacks authority to require such certification as a term of an administrative order.

As requested by Paragraph 72, Atlantic Richfield confirms, to the best of its knowledge, that it has complied with all EPA requests for information regarding the Site that have been directed to Atlantic Richfield pursuant to sections 104(e) and 122(e) of CERCLA. To Respondent's knowledge, no requests for information regarding the Site have been made upon Respondent for information under section 3007 of RCRA or state law.

Atlantic Richfield also objects to the requirement set forth in Paragraph 70 that purports to obligate the Respondent to retain "all Records that related to the liability of any other person under CERCLA with respect to the Site." No such requirement arises under CERCLA or the NCP, and is not enforceable.

Atlantic Richfield appreciates the Agency's consideration of these comments, and EPA's written response confirming Atlantic Richfield's understanding of the terms of the UAO. Please contact Mr. Dunlap or Atlantic Richfield's counsel, Jean Martin, with any questions related to the content of this Notice of Intent to Comply submittal. Mr. Dunlap's contact information is

provided above; Ms. Martin may be contacted at Jean.Martin@BP.com or by phone at (832) 619-5239 (office) or (713) 454-9075 (cell)..

We look forward to continuing to work closely with EPA and MDEQ on RD/RA Work activities that remain within the Smelter Hill Uplands RDU. Please include these comments upon the UAO in the administrative record and site file for the Anaconda Smelter Superfund Site.

Sincerely,

A handwritten signature in black ink that reads "Patricia Gallery". The signature is fluid and cursive, with the first name "Patricia" being larger and more prominent than the last name "Gallery".

Patricia Gallery
Portfolio Manager, Remediation Management

cc: Martin Hestmark
Joe Vranka
Joel Chavez
Jon Morgan, Esq.
Jean Martin, Esq.
Ron Halsey
Luke Pokorny
Shannon Dunlap
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